BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JONATHAN Z. TYLER Claimant	)	
VS.	)	
GOODYEAR TIRE & RUBBER COMPANY Respondent	)	Docket No. 1,038,177
AND	)	
LIBERTY MUTUAL INS. CO. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the November 25, 2008, Award entered by Administrative Law Judge Brad E. Avery. The Board heard oral argument on March 10, 2009. George H. Pearson, of Topeka, Kansas, appeared for claimant. John A. Bausch, of Topeka, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) gave greater deference to the impairment ratings of Dr. Zimmerman and Dr. Huston than of Dr. Bieri and found that claimant had a 6.5 percent permanent partial impairment to the whole body. Noting that K.S.A. 44-510e was unambiguous, the ALJ found that claimant was entitled to a work disability. The ALJ concluded that claimant had suffered a 43 percent loss of wage and a 40 percent task loss and calculated his work disability to be 41.5 percent.

The Board has considered the record and adopted the stipulations listed in the Award. The Board also considered the independent medical examination report of Dr. Joseph Huston filed June 25, 2008. During oral argument to the Board, the parties stipulated that claimant has a 6.5 percent permanent impairment of function as found by the ALJ. The parties further agreed that there is no issue concerning any additional credit for preexisting impairment. Finally, respondent acknowledged that average weekly wage is not an issue, and respondent is not seeking a remand to the ALJ.

ISSUES

Respondent asserts that claimant has been working the same job for respondent since the day after the accident with no restrictions or accommodations, and the only difference has been the addition of a fourth shift at the plant, which reduced the number of opportunities for claimant to work overtime. Respondent requests that claimant's award of work disability be reversed because there is no causal connection between claimant's injury and his lower post-accident average weekly wage, (AWW) which was caused only by the reduced number of overtime hours available to work.

Claimant contends that respondent unilaterally reduced his wages by changing his work classification, resulting in a loss of overtime wages. Claimant argues that there is no requirement that his reduced wage must be directly caused by his injury and further notes that requirements cannot be added to the Workers Compensation Act that are not readily found in the statutory language. Claimant, therefore, asserts that the reduction in his post accident AWW entitles him to a work disability

The issue for the Board's review is the nature and extent of claimant's disability, specifically whether claimant is entitled to a work disability (a permanent partial disability in excess of his percentage of functional impairment).

FINDINGS OF FACT

On January 29, 2007, claimant was injured at work when a chain with an attached hook and hammer lock fell and hit him on the top of his head. He suffered a cut on the top of his head and injured his neck. He was taken to the hospital, where x-rays were taken. He returned to his regular job the next day with no restrictions.

After his treatment at the hospital on January 29, claimant was seen by the company doctor, Dr. Zeller, at the plant dispensary. He saw no other medical providers until respondent authorized him to see Dr. Michael Smith on June 19, 2007. Dr. Smith ordered an MRI of his neck area, which showed broad disc bulging at C4-5 and minimal bulging at C5 through C7. He was diagnosed with cervical spondylosis at C4-5. Dr. Smith sent claimant to Dr. Nicolae, who performed two cervical epidural block injections. Dr. Smith released claimant as having reached maximum medical improvement on September 25, 2007. Claimant has had no treatment for his injuries after that date.

Dr. Daniel Zimmerman, a board certified independent medical examiner, examined claimant on February 8, 2008, at the request of claimant's attorney. Based on the AMA

Guides,[1] Dr. Zimmerman rated claimant as having an 11 percent permanent partial impairment to the body as a whole. He said that claimant had an unoperated stable medically documented injury, which gave him a 6 percent impairment for his cervical spine condition. He had range of motion limitations at the cervical level, which gave him a 5 percent permanent partial impairment. These impairments combined for an 11 percent permanent partial impairment to the body.

Dr. Zimmerman placed permanent restrictions on claimant. He indicated that claimant was capable of lifting 50 pounds on an occasional basis and 25 pounds frequently. He recommended that claimant avoid hyperflexion and hyperextension of the cervical spine or holding the cervical spine in captive positions for extended periods of time. Dr. Zimmerman reviewed a task list prepared by Dick Santner. Of the 30 tasks on that list, he opined that claimant was unable to perform 12 for a 40 percent task loss.

Dr. Peter Bieri, an ear, nose and throat physician whose practice includes disability evaluations and determinations, examined claimant on March 10, 2008, at the request of respondent. Claimant told Dr. Bieri that he had significant but incomplete relief of his neck pain with the epidural block injections. He reported to Dr. Bieri that he continues to have occasional discomfort, primarily with captive positioning and active range of motion. Claimant was not using any medicine for pain relief. He told Dr. Bieri that he had another incident on June 22, 2007, in which he was again hit in the head at work. He said that he had increased neck pain after that incident but has returned to the same status he was before.

Dr. Bieri's examination of claimant's cervical spine region revealed no muscle spasm. There was no significant tenderness to palpation. Active range of motion was slightly reduced to flexion and extension. Dr. Bieri concluded that claimant had cervical spondylosis, a degenerative joint disease. However, he noted that claimant had similar findings as far back as 2000 and opined that claimant's cervical spondylosis preexisted his January 29, 2007, accident. On cross-examination, however, Dr. Bieri acknowledged that there was not evidence of prior encroachment or compression of the thecal sac at any level whereas the June 26, 2007, MRI showed compression at three cervical levels, C4-5, C5-6 and C6-7.

Dr. Bieri opined that claimant had no rateable permanent impairment related to the accident on January 29, 2007, because he believed claimant had returned to his preexisting status. Dr. Bieri stated that at the time he saw claimant, he had been released to his regular job with no formal restrictions, and he placed no restrictions on claimant. Dr. Bieri reviewed the task list prepared by Richard Santner and opined that claimant was physically capable of performing all 30 tasks listed on the task list. He later admitted that

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[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

someone with cervical spondylosis should not perform task Nos. 15, 17, 18 and 19, which involved lifting up to 143 pounds. However, he qualified that admission by stating that he did not think anyone should perform a task that involved lifting up to 143 pounds.

Dr. Joseph Huston, a board certified orthopedic surgeon, examined claimant on June 13, 2008, at the request of the ALJ. Dr. Huston reviewed claimant's medical records from his injury of January 29, 2007, as well as medical records of previous accidents in 1998 and 2000.

Claimant complained that he had constant daily aching discomfort in the back of his neck that went up to the base of his skull and across the upper areas of both shoulders. He said that certain motions of his head and neck caused an increased stabbing kind of pain. Examination of the neck caused claimant to complain of minimal tenderness with palpation of the posterior cervical spine and the paravertebral posterior lateral muscles on the right and left. He had some loss of range of motion of cervical flexion, extension, and rotation. According to Dr. Huston, claimant had no radiculopathy or nerve root compression.

Based on the AMA *Guides*, Dr. Huston rated claimant as having a 6 percent permanent partial impairment to the body as a whole. He found that of that 6 percent, 4 percent was preexisting and 2 percent was due to the January 29, 2007, injury. He did not recommend any specific work restrictions but suggested that claimant somewhat limit the amount of looking up and looking around to the right and left.

Dick Santner, a vocational rehabilitation counselor, interviewed claimant on January 29, 2008, and again by phone later, at the request of claimant's attorney. Together they compiled a list of 30 tasks claimant had performed in the 15-year period before his injury of January 29, 2007. At the time of the interview, claimant was still working at respondent and working significant overtime. However, claimant told Mr. Santner that he would no longer be able to do that. Mr. Santner believed that even without overtime, the wage claimant was earning at respondent was the best he was capable of earning given his education, work history and job training.

Claimant has admitted that he returned to his regular job at Goodyear and is able to perform that job, although he does have some discomfort. His hourly wage has remained the same. The parties have stipulated that claimant had a preinjury AWW of $1,654.

Claimant is claiming a reduction in his AWW beginning July 21, 2008. On that date, respondent added a fourth shift to the plant and changed his status from conventional to six and two-thirds. He explained that before July 21, 2008, he worked Monday through Friday. Respondent then had the option to force him to work on Saturday, which they did every week. Respondent would then need volunteers to work Sunday to continue to monitor and work the heaters. Normally, claimant and two other employees would

volunteer to cover all three shifts on Sunday. In the event one of the other employees did not volunteer for the day shift, then claimant could work either 12 or 16 hours on Sunday. Claimant now works Thursday, Friday, Saturday, Sunday and Monday. Because of the change, he does not have the opportunity to earn as much overtime. His AWW has dropped from $1,654 to $940.57, a loss of 43 percent. Claimant admitted that on at least one occasion he could have signed up to work eight hours of overtime but did not feel like working it, saying, "[Y]ou can only work so much overtime."[2]

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[3] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[4]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[5]

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the

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[2] R.H. Trans. at 22.

[3] K.S.A. 2007 Supp. 44-501(a).

[4] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[5] *Id.* at 278.

credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-510e(a) states in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

In *Hernandez*,[6] the Court of Appeals affirmed the Board's finding that Mr. Hernandez was not entitled to a work disability. The Board had concluded that "'the fundamental function and purpose of the Act requires that there be a nexus between the injury and the wage loss before that loss can be a factor used to calculate the amount of benefits.'"[7]

Recently, in *Gutierrez*,[8] the Kansas Court of Appeals stated: "In recent cases, the Kansas Supreme Court has emphasized that requirements should not be added to the Kansas Workers Compensation Act that are not readily found in the statutory language."

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[6] *Hernandez v. Monfort, Inc.*, 30 Kan. App. 2d 309, 41 P.3d 886, *rev. denied* 274 Kan. 1112 (2002).

[7] *Id.* at 310.

[8] *Gutierrez v. Dold Foods, Inc.*, ___ Kan. App. 2d ___, Syl. ¶ 5, 199 P.3d 798 (No. 99,535 filed January 16, 2009); see also *Graham v. Dokter Trucking Group*, 284 Kan. 547, Syl. ¶ 3, 161 P.3d 695 (2007); *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, Syl. ¶ 6, 154 P.3d 494 (2007).

"An employee who returns to work at the employee's pre-injury wage and then within a few weeks of the date of return receives a termination notice due to economic layoff is not precluded from a finding of wage loss for workers compensation benefits."[9]

In *Roskilly*,[10] the Court of Appeals held that K.S.A. 44-510e(a) "does not preclude an award of work disability after a claimant's loss of employment, even though due to reasons other than his or her injury." Further, the court stated: "We hold that on its face K.S.A. 44-510e(a) no longer may be read to make a distinction between accommodated employment and unaccommodated employment when determining an injured worker's right to recover work disability benefits."[11]

In *Stephen*,[12] the Kansas Court of Appeals found that an elected official who lost an election after being injured on the job was entitled to a work disability, holding: "The work-disability award provides partial compensation for post-injury wage loss. Even if that wage loss is increased because the employee loses his or her pre-injury job, there is no statutory requirement that the job loss be caused by the injury."

In *Beck*,[13] the Kansas Court of Appeals held: "The fact that an employee was terminated due to reasons other than his or her injury does not necessarily preclude an award of wage loss for work disability benefits." The court further stated:

> The evidence indicates that claimant suffered a task loss, and that loss would make it more difficult for her to find a position in the open market where she would earn a comparable wage. We conclude that under these facts, claimant was entitled to her award of work disability benefits.[14]

In *Nistler*,[15] a case involving computation of post-injury wages, the Court of Appeals held:

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[9] *Gadberry v. R.L. Polk & Co.*, 25 Kan. App. 2d 800, Syl. ¶ 4, 975 P.2d 807 (1998).

[10] *Roskilly v. Boeing Co.*, 34 Kan. App. 2d 196, 200, 116 P.3d 38 (2005).

[11] *Id.* at 201.

[12] *Stephen v. Phillips County*, 38 Kan. App. 2d 988, Syl. ¶ 2, 174 P.3d 988, *rev. denied* 286 Kan. __ (2008).

[13] *Beck v. MCI Business Services, Inc.*, 32 Kan. App. 2d 201, Syl. ¶ 5, 83 P.3d 800, *rev. denied* 276 Kan. 967 (2003).

[14] *Id.* at 206.

[15] *Nistler v. Footlocker Retail, Inc.,* 40 Kan. App. 2d 831, Syl. ¶ 5, 196 P.3d 395 (2008).

> The phrase within K.S.A. 44-510e "engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury," is an unambiguous statement of legislative policy . . . .

ANALYSIS

Claimant is claiming a wage loss and work disability beginning with a reduction in his post-accident earnings on July 21, 2008. Before that date, claimant was working at his regular job and earning at least 90 percent of his pre-accident AWW. Therefore, for the period from January 29, 2007, his date of accident, until July 20, 2008, claimant's permanent partial disability is limited to his percentage of functional impairment. The parties agree with the ALJ's finding that claimant's permanent impairment of function is 6.5 percent.

Respondent contends claimant is not entitled to a work disability award under K.S.A. 44-510e because there is no causal connection between claimant's injury and his loss of overtime pay. However, as the Court of Appeals stated in *Stephen*, the statute does not require a direct causal connection between the injury and the wage loss. Nevertheless, the nexus requirement in *Hernandez* has never been expressly overruled. Moreover, the more recent cases cited above all involved claimants who lost their jobs and found themselves in the open labor market with restrictions that reduced or limited their wage earning ability. That is not the situation here. In this case, claimant remains employed with the same employer performing the same job. His pay has been reduced due to economic factors unrelated to his injury or restrictions. The absence of a presumption of no work disability is not proof of a work disability. It is not the purpose of the Workers Compensation Act to compensate injured workers for any and all wage losses. Instead, it is the purpose of the Act to compensate workers for their injuries. This presupposes some connection between the injury and the wage loss. Even when the injury does not directly cause the wage loss, it should be a factor. Here the wage loss is neither the result of the injury, nor is claimant in the open labor market with work restrictions from his injury that affect his wage-earning ability. The Board reverses the ALJ's Award of work disability.

CONCLUSION

Claimant is not entitled to a work disability. His permanent partial disability is 6.5 percent.

The Board notes that the ALJ did not award claimant's counsel a fee for his services because the record does not contain a fee agreement between claimant and his attorney. K.S.A. 44-536(b) requires that the Director review such fee agreements and approve such contract and fees in accordance with that statute. Should claimant's counsel desire a fee be approved in this matter, he must submit his contract with claimant to the ALJ for approval.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated November 25, 2008, is modified to find claimant has a 6.5 percent permanent partial disability.

Claimant is entitled to 26.98 weeks of permanent partial disability compensation at the rate of $483 per week or $13,031.34 for a 6.5 percent functional disability, making a total award of $13,031.34, which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of March, 2009.

_____
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENT

I respectfully disagree with the majority and would affirm the Award. As indicated by the well-written decision of Judge Avery, the Workers Compensation Act should be interpreted as written without adding that which is not contained in the language of the Act. That principle was duly emphasized in the recent Kansas Supreme Court decisions of *Graham*[16] and *Casco*[17].

[16] *Graham v. Dokter Trucking Group*, 284 Kan. 547, 161 P.3d 695 (2007).

[17] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh. denied* (2007).

In *Casco*, the Kansas Supreme Court held:

> When construing statutes, we are required to give effect to the legislative intent if that intent can be ascertained. When a statute is plain and unambiguous, we must give effect to the legislature's intention as expressed, rather than determine what the law should or should not be. A statute should not be read to add that which is not contained in the language of the statute or to read out what, as a matter of ordinary language, is included in the statute.[18]

And in *Graham*, which specifically dealt with the wage loss prong of K.S.A. 44-510e, the Kansas Supreme Court overturned an interpretation of the statute that added an evidentiary requirement that was not there. The Kansas Supreme Court held:

> The statute sets out a formula for computing a permanent partial work disability award. Stated mathematically, the percentage of permanent partial work disability is equal to the percentage of task loss plus the percentage of wage loss divided by two. The task loss percentage is defined by the plain language of the statute as the "percentage to which the employee, in the opinion of the physician, has lost the ability to perform [preinjury] work tasks." K.S.A. 44-510e(a). **The wage loss percentage is defined by the plain language of the statute as "the difference between the [preinjury] average weekly wage . . . and the [postinjury] average weekly wage." K.S.A. 44-510e(a).**
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> The plain language of the statute also tells us that the percentage of task loss is dependent in part on the opinion of a physician. The statute contains no similar evidentiary requirement **for proof of the wage loss percentage; it is simply calculated by the factfinder based on the difference between the preinjury weekly wage and the postinjury weekly wage. K.S.A. 44-510e(a).**
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> **The Court of Appeals erred in overlooking the import of this plain language in the statute**, instead attempting to divine legislative intent from a review of legislative history. See *Graham* [*v. Dokter Trucking Group*, 36 Kan. App.2d 521, 141 P.3d 1192 (2006)]. In our view, that step is unnecessary. Statutory interpretation begins with the language selected by the legislature. If that language is clear, if it is unambiguous, then statutory interpretation ends there as well. See *Perry* [*v. Board of Franklin County Comm'rs*], 281 Kan. [801, 809, 132 P.3d 1279 (2006)].[19] (Emphasis added.)

In short, the majority of the Board has not followed the plain, unambiguous language of K.S.A. 44-510e; instead, the majority has inappropriately determined what the law should be. It is the function of the legislature, not the Board, to make public policy.

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[18] *Casco*, 283 Kan. 508, Syl. ¶ 6.

[19] *Graham*, 284 Kan. at 556-57.

The majority has erred and exceeded its authority. Claimant's wage loss should be determined by simply comparing his pre- and post-injury wages.

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BOARD MEMBER

c: George H. Pearson, Attorney for Claimant
John A. Bausch, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge